New York Tel goes to great length to argue that the Federal PICC should not be deducted, generally because the only *instance in which a payphone line would be subject to the PICC* "is when a payphone line is not pre-subscribed to an IXC". (NYT Comments, p. 8). That assertion is incorrect, and totally misses the point.

To prevent double recovery of costs, economic analysis (and the FCC's Order) require that all monies received by an ILEC, associated with a payphone line, be subtracted from the TELRIC costs. The source of that additional revenue is not relevant.

In the case of the EUCL, it is paid by the PSP directly to the ILEC. For the most part, the PICC is paid to the ILEC by the IXC to which the payphone is subscribed, with the IXC then passing through the charge to the PSP. In the situation where there is no presubscribed IXC, the PICC is paid directly by the PSP to the ILEC. But, whether the payphone line is or is not prescribed to an IXC, the ILEC receives (in addition to the $8.08 EUCL) a PICC of $3.48, either from the IXC or the PSP. The source of the payment is irrelevant. Thus, the combined total of the EUCL and PICC (plus an amount for CCL contribution) must be subtracted from the TELRIC-based PAL rate paid by the PSP to New York Telephone.

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further reduced to reflect average CCL collections per payphone line by NYT.

POINT E: <u>Rates for Usage Must Be Based on TELRIC Costs.</u>

In its Complaint, IPANY demonstrated the FCC's New Services Test required that payphone providers pay TELRIC-based usage rates, comparable to UNE switching rates, rather than retail business usage rates. New York Tel asserted IPANY was wrong. The FCC's Order confirms that IPANY is correct.

Specifically, paragraph 7 of the FCC's Order makes clear that the New Services Test - and the TELRIC methodology encompassed by it - applies to "usage-sensitive elements whether specified in the payphone line tariff or cross-referenced to another tariff as well as flat rate elements...".

Accordingly, New York Telephone should immediately make available to payphone service providers underlying usage at the same TELRIC-based rates for switching and termination of traffic applicable to purchasers of Unbundled Network Elements.

POINT F: <u>Payphone Service Providers Are Entitled To Refunds For Excessive PAL Rates Back To April 1, 1997.</u>

New York Telephone disputes IPANY's assertion that the pay telephone rates approved on March 31, 1997, went into effect on a temporary basis, and accordingly should be the basis for refunds for excessive PAL line charges.[12]

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[12] Case 96-C-1174, "Order Approving Tariff On A Temporary Basis", issued and effective March 31, 1997.

In taking that position, New York Telephone ignores the history of this proceeding, and NYT's own specific pledge to the Federal Communications Commission that the Company's underlying payphone rates would in fact be subject to refunds.

The Company's original PAL rates, as filed with this Commission, became effective in 1992, long before passage of the Telecommunications Act and issuance of the FCC's Payphone Orders specifying that such rates had to comply with the New Services Test.

The tariff filing made on December 31, 1996, did, as New York Telephone indicates, propose new rates only for Public Access Smart-Pay (PASPL rates). It did not propose reductions in the existing PAL rate. The reason for that, as represented to the FCC, was the claim by NYT and other RBOCs that "none of us understood the payphone orders to require previously-tariffed intrastate payphone services, such as the COCOT line, to meet the Commission's 'New Services' test."[13]

It was particularly critical for the RBOCs to comply with the New Services test, not only because the FCC's Orders required it, but also because the RBOCs would not be able to earn dial-around compensation on calls from their own pay telephones until their tariffs for underlying payphone services provided to PSPs did in fact comply with the New Services Test. Accordingly,

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[13] Letter of April 10, 1997, from Michael K. Kellogg, Counsel to the RBOC Payphone Coalition, to Mary Beth Richards, Deputy Bureau Chief, Common Carrier Bureau. A copy of that letter is annexed to these Reply Comments.

in Order to induce the FCC to permit the RBOCs to begin receiving dial-around compensation, the RBOCs promised the FCC they would promptly file new State tariffs for payphone services, which would comply with the New Services Test, and that "once the new State tariffs go into effect, to the extent that the new tariff rates are lower than the existing ones, we will undertake to reimburse or provide a credit to those purchasing the services back to April 15, 1997." Letter from Michael B. Kellogg to Mary Beth Richards, April 10, 1997, page 2. The letter went on to note the commitment to pay refunds was a voluntary undertaking, and thus payment of the retroactive refund would not be precluded on a State or Federal level by the filed tariff doctrine.

The direct beneficiaries of that New York Telephone promise - a promise made to allow New York Telephone to begin earning dial-around compensation - were the payphone service providers who would be entitled to lower rates as a result of the New Services test.

NYT was always on full notice of IPANY's claims regarding the excessive PAL rate line. IPANY specifically objected to NYT's payphone tariffs shortly after they were filed by NYT on December 31, 1996. As a result, among other things, of the objections filed by IPANY, the Commission issued an Order seeking additional comments from interested parties.[14] In

[14] Notice Requesting Comments Addressing Aspects of the Federal Payphone Regulations, the Need for Changes to the Commission's COCOT Regulations and Certain LEC Payphone Tariffs, issued July 30, 1997.

response thereto, IPANY submitted comments on September 30, 1997, which, as discussed earlier, urged that, to comply with the New Services test, NYT's PAL rate be set at the UNE unbundled link rate less the EUCL and PICC.

Thus, whether or not the Order issued by this Commission on March 31, 1997, required that NYT's existing PAL rates be subject to refund, is irrelevant. By separate and binding promise made to the FCC, New York Telephone agreed that, should its pre-existing PAL rates be determined to be non-compliant - which they have been - refunds would be provided back to April of 1997. It is therefore fully appropriate that this promise be enforced by this Commission.

IV. <u>CONCLUSION</u>

For the reasons set forth herein, and in the Petition filed by IPANY on December 2, 1999, this Commission should:

(a) Immediately establish the rate for a Public Access Line at the geographically deaveraged UNE unbundled link rate, less the Federal EUCL and PICC, and less an estimate for CCL contribution;

(b) Establish rates for underlying payphone usage services equivalent to TELRIC unbundled switching and termination rates; and

(c) Order refunds of the difference between the PAL rate in effect, and the TELRIC unbundled link UNE rate, less EUCL and PICC, which should have been in effect, back to April 15, 1997.

Respectfully submitted,

Independent Payphone Association of New York, Inc.

By: ____________________

Keith J. Roland
Its Attorney
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Albany, New York
March 20, 2000

ATTACHMENT A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Wisconsin Public Service Commission	)	CCB/CPD No. 00-1
Order Directing Filings	)	

ORDER

Adopted: March 1, 2000 Released: March 2, 2000

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order, we direct the four largest incumbent local exchange carriers (LECs) in Wisconsin[1] to submit to the Federal Communications Commission (Commission) copies of the currently effective tariffs for intrastate payphone service offerings that have not been determined by the Wisconsin Public Service Commission (Wisconsin Commission) to comply with section 276 of the Communications Act of 1934, as amended (Act) and the Commission's rules.

II. BACKGROUND

2. Section 276 of the Act establishes requirements designed to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public.[2] In its Payphone Reclassification Proceeding,[3] the Commission adopted regulatory requirements implementing section 276. The Commission required, *inter alia,* that incumbent LECs file tariffs for basic payphone lines at the state level only, and that unbundled features and functions provided by incumbent LECs to their own payphone operations or to others be tariffed at both the state and federal levels.[4] The Commission required that all incumbent LEC

[1] The four largest incumbent LECs are Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin), GTE North Incorporated (GTE), the subsidiaries of Century Telephone Enterprises, Inc. (Century), and the Telephone Data Systems, Inc. (TDS).

[2] 47 U.S.C. § 276(b)(1).

[3] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecomm. Act of 1996,* CC Docket No. 96-128, *First Report and Order,* 11 FCC Rcd 20541 (1996); *Order on Reconsideration,* 11 FCC Rcd 21233 (1996)(*Payphone Reconsideration Order*), *aff'd in part and remanded in part sub nom. Ill. Public Telecomm. Ass'n v. FCC,* 117 F.3d 555 (D.C. Cir. 1997); *Second Report and Order,* 13 FCC Rcd 1778 (1997)(*Payphone Clarification Order*), *aff'd in part and remanded in part sub nom. MCI v. FCC,* 143 F.3d 606 (D. C. Cir. 1998); *Third Report and Order and Order on Reconsideration of the Second Report and Order,* 14 FCC Rcd 2545 (1999), *appeal pending sub nom. American Public Communications Council v. FCC,* Case No. 99-1114 (D. C. Cir. filed Mar. 22, 1999).

[4] *Payphone Reconsideration Order,* 11 FCC Rcd at 21307-09.

payphone tariffs filed at the state level be cost-based, nondiscriminatory, and consistent with both section 276 and the Commission's Computer III tariffing guidelines.[5] The Commission determined that the rates assessed by LECs for payphone services tariffed at the state level must satisfy the requirements that the Commission applies to new interstate access service proposed by incumbent LECs subject to price cap regulation (the "new services test").[6] The Commission stated that it would rely initially on state commissions to ensure that the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of section 276.[7] The Commission also determined that state commissions that are unable to review these tariffs may require incumbent LECs operating in their states to file these tariffs with the Commission. The Common Carrier Bureau (Bureau) has emphasized that the Commission retains jurisdiction under section 276 to ensure that all requirements of section 276 and the Payphone Reclassification Proceeding are met.[8]

3. On November 6, 1997, the Wisconsin Commission issued a letter order in its Docket 05-TI-156. In the letter order, the Wisconsin Commission held that its own jurisdiction to investigate the rates charged by LECs to payphone service providers "is very narrowly circumscribed to enforcing a prohibition on cross subsidy...and discriminatory practices."[9] The Wisconsin Commission also stated that the statutory remedies available under Wisconsin law "only address whether the retail rates charged by telecommunications utilities for competitive telecommunications service recover the underlying cost for that service." Accordingly, the Wisconsin Commission found that it lacks jurisdiction under state law to ensure that the rates, terms, and conditions applicable to providing basic payphone services comply with the requirements of section 276 of the Act and the Commission's implementing rules.[10]

4. On October 28, 1998, the Bureau sent a letter to the Wisconsin Commission stating that, after a review and consideration of the Wisconsin Commission's November 6, 1997 letter order, it was our intention to require the four largest LECs in Wisconsin to file with the "FCC tariffs that set forth the rates, terms, and conditions associated with pay phone services, along with the required

[5] *Payphone Clarification Order*, 13 FCC Rcd at 1780 ¶ 2, citing *Payphone Reconsideration Order*, 11 FCC Rcd at 21308.

[6] *See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, *Report and Order*, 104 FCC 2d 958 (1986). The new services test is a cost-based test that establishes the direct cost of providing the new service as a price floor. LECs then add a reasonable amount of overhead to derive the overall price of the new service. *See Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, CC Docket No. 89-79, *Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking*, 6 FCC Rcd 4524 (1991).

[7] *See Letter to Joseph P. Mettner, Chairman, Public Service Commission of Wisconsin, from Kathryn C. Brown, Chief, Common Carrier Bureau*, 13 FCC Rcd 20865 (Com. Car. Bur. 1998).

[8] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, *Order*, 12 FCC Rcd 20997 (Com. Car. Bur. 1997); *see also North Carolina Utilities Commission Order Dismissing and Directing Filings*, 13 FCC Rcd 5313 (Com. Car. Bur. 1998).

[9] Wisconsin Public Service Commission Letter Order, Docket No. 05-TI-156, November 6, 1997 (unpublished).

[10] *Id.*

supporting documentation."[11]

III. DISCUSSION

5. The Wisconsin Commission's stated lack of authority to review these payphone service offerings invokes this Commission's obligations under section 276[12] and the Commission's *Payphone Orders*[13] to promote competition among payphone service providers and ensure the widespread deployment of public payphone service, among other things. We therefore direct the four largest LECs in Wisconsin to submit currently effective intrastate tariffs that set forth the rates, terms, and conditions associated with payphone services to the Commission, along with the supporting documentation in compliance with the requirements of section 276 and the Commission's implementing rules, including the new services test. More specifically, in order to ensure that the tariffs for the four largest LECs in Wisconsin comply with section 276 of the Act, and pursuant to the Commission's Payphone Orders, we direct Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin), GTE North Incorporated, subsidiaries of Century Telephone Enterprises Inc., and the Telephone Data Systems, Inc.to submit tariffs for intrastate payphone service offerings to this Commission, together with the supporting documentation, as detailed below, necessary to demonstrate compliance with the requirements of section 276 and the Commission's implementing rules.

6. The submissions we require these incumbent LECs to make are not official tariff filings subject to or required by section 203 of the Act. Rather, the information submitted is necessary to permit us to review the incumbent LECs' rates, terms and conditions for a local service, payphone line service, that is normally tariffed in the intrastate jurisdiction. We require these submissions under authority of section 276 of the Act, in order to ensure that the incumbent LECs fully comply with our Payphone Orders. If we find an incumbent LEC's payphone line rate is not in compliance with the new services test or other section 276 requirements, we have authority, pursuant to section 205, 47 U.S.C. § 205,[14] and our general authority under section 4(i) of the Act, 47 U.S.C. § 154(i), to make a determination as to the maximum permissible rate and to require the incumbent LEC to

[11] *See Letter to Joseph P. Mettner, Chairman, Public Service Commission of Wisconsin, from Kathryn C. Brown, Chief, Common Carrier Bureau*, 13 FCC Rcd at 20866.

[12] 47 U.S.C. § 276 (b)(1).

[13] *See supra* note 2.

[14] Section 205 provides the Commission with general prescription authority over carrier charges, classifications, regulations, and practices that the Commission determines are "in violation of any of the provisions of this Act." 47 U.S.C. § 205(a). With the enactment of section 276, which expressly addresses intrastate as well as interstate payphone services, the Commission's section 205 authority has been effectively extended to include prescription of a carrier's charges for intrastate payphone line service if existing charges violate section 276 or the Commission's implementing regulations. In somewhat analogous circumstances, the Supreme Court ruled that the Commission's general rulemaking authority under section 201(b) of the Act extends to the adoption of rules regarding intrastate matters that become subject to the Commission's jurisdiction as a result of enactment of the Telecommunications Act of 1996. *AT&T v. Iowa Utilities Board*, 525 U.S. 366, ___, 119 S. Ct. 721, 729-30, 142 L. Ed.2d 834, 848-49 (1999). Thus, we may prescribe a payphone line rate, if necessary, and ensure compliance with such a prescription order, even though the prescribed rate may be filed in a state tariff.

charge no more than that rate, as a measure necessary to the execution of the Commission's section 276 functions. 47 U.S.C. § 205(a); *see also* 47 U.S.C. §§ 154(i) and 276(b), (c).

7. We intend to review these submissions in a procedural manner similar to tariff review proceedings such as those conducted for "open network architecture" (ONA) tariffs under Computer III tariffing guidelines. Except as otherwise directed, the incumbent LECs should file a copy of a tariff and supporting information, in accordance with the ordinarily applicable Commission rules (e.g., usage-sensitive elements whether specified in the payphone line tariff or cross-referenced to another tariff as well as flat rate elements) and should provide cost support for each rate element in accordance with the cost support requirements described below. Rates, terms and conditions for other services commonly used by payphone service providers ("PSPs") (e.g., call screening services) should also be included.[15] For each rate element, the incumbent LEC must submit complete cost studies with full documentation. Summaries of cost study results are not acceptable.[16] The initial submissions will be subject to public comment, and LECs will have the opportunity to respond to the comments that are filed.[17]

8. In order to avoid unnecessary confusion and delay in the implementation of Payphone Order-compliant tariff filings, we set forth briefly below some of the methodological principles applied under Computer III and other relevant FCC proceedings addressing the application of the new services test and cost-based ratemaking principles to services and facilities offered by incumbent LECs to providers of services that compete with incumbent LEC services. While we have allowed some flexibility in the application of these principles in particular contexts, absent a persuasive justification, we expect the incumbent LECs to apply these principles consistently and rigorously to the cost justification of rates for services needed by incumbent LECs' payphone service competitors.

9. To satisfy the new services test, an incumbent LEC filing payphone line rates must demonstrate that the proposed rates do not recover more than the direct costs of the service plus "a just and reasonable portion of the carrier's overhead costs."[18] Costs must be determined by the use of an appropriate forward-looking, economic cost methodology that is consistent with the principles the Commission set forth in the Local Competition First Report and Order.[19]

10. With respect to the calculation of direct costs, our longstanding new services test policy

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[15] Such services should be included in the submissions even if they are also offered to non-payphone subscribers.

[16] See generally Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 6 FCC Rcd 5682 (1991); *Open Network Architecture Tariffs*, 7 FCC Rcd 1512, 1515 ¶¶ 20-22.

[17] Thus, we expect LECs to treat their initial submissions as they would treat a Direct Case filed in a section 204 investigation of a tariff for interstate service.

[18] 47 CFR § 61.49(f)(2).

[19] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499 (1996).

is to require the use of consistent methodologies in computing direct costs for related services.[20] Cost study inputs and assumptions used to justify payphone line rates should, therefore, be consistent with the cost inputs used in computing rates for other services offered to competitors.

11. In determining a just and reasonable portion of overhead costs to be attributed to services offered to competitors, the LECs must justify the methodology used to determine such overhead costs.[21] Absent justification, LECs may not recover a greater share of overheads in rates for the service under review than they recover in rates for comparable services.[22] Given that the new services test is a cost-based test, overhead allocations must be based on cost, and therefore may not be set artificially high in order to subsidize or contribute to other LEC services.[23] For purposes of justifying overhead allocations, UNEs appear to be "comparable services" to payphone line services, because both provide critical network functions to an incumbent LEC's competitors and both are subject to a "cost-based" pricing requirement. Thus, we expect incumbent LECs to explain any overhead allocations for their payphone line services that represent a significant departure from overhead allocations approved for UNE services.

12. We also note that the forward-looking cost studies we have required in the contexts described above produce cost estimates on an "unseparated" basis. In order to avoid double recovery of costs, therefore, the LEC must demonstrate that in setting its payphone line rates it has taken into account other sources of revenue (*e.g.*, SLC/EUCL, PICC, and CCL access charges) that are used to recover the costs of the facilities involved.

13. At this time, this Order only applies to the LECs in Wisconsin specifically identified herein. No other Wisconsin LECs are being required at this time to submit data to the Commission. As stated above, all copies of tariffs, including supporting information, must comply with Part 61 of our Rules, 47 C.F.R. §§ 61.1 *et seq*. We require that these copies of tariffs and supporting documentation be filed by May 12, 2000.

IV. PROCEDURAL MATTERS

14. An original and six copies of all documents must be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. In addition, parties must file two copies of any such documents with the Competitive Pricing Division, Common Carrier Bureau, 445 12th Street, S.W., Room 5-A207, Washington, DC 20554. Parties must also deliver one copy of such documents to ITS, Inc., the Commission's duplicating

[20] *See generally Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 6 FCC Rcd 4524, 4531 ¶ 42; *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154, 5187-88 ¶ 122 (1994).

[21] *Amendment of Part 69*, 6 FCC Rcd at 4531 ¶ 44.

[22] *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154, 5189 ¶ 128 (1994).

[23] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499 ¶ 713 (1996).

contractor, at its office at 1231 20th Street, N.W., Washington, DC 20036. The documents should reference CCB/CPD No. 00-1.

15. *This matter shall be treated as a "permit but disclose" proceeding and subject to the* "permit but disclose" requirements under 47 C.F.R. § 1.1206(b), as revised. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 C.F.R. § 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in "permit but disclose" proceedings are set forth in Section 1.1206(b) as well.

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that, pursuant to sections 205, 276 and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 276, and through authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, Ameritech, GTE, Century and TDS shall file by May 12, 2000, tariffs as described above for intrastate payphone service offerings in Wisconsin with the Commission, together with all supporting documentation described above necessary to demonstrate compliance with the requirements of section 276 and the Commission's implementing rules.

FEDERAL COMMUNICATIONS COMMISSION

Yog R. Varma
Deputy Chief
Common Carrier Bureau

ATTACHMENT B

RECEIVED

APR 1 0 1997

Federal Communications Commission
Office of Secretary

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April 10, 1997

Ex Parte Filing

Mary Beth Richards
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128

Dear Mary Beth:

I am writing on behalf of the RBOC Payphone Coalition to request a limited waiver of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions, as set forth in the Commission's Orders in the above-captioned docket. I am also authorized to state that Ameritech joins in this request.

As we discussed yesterday, and as I explained in my Letter of April 3, 1997, none of us understood the payphone orders to require existing, previously-tariffed intrastate payphone services, such as the COCOT line, to meet the Commission's "new services" test. It was our good faith belief that the "new services" test applied only to new services tariffed at the federal level. It was not until the Bureau issued its "Clarification of State Tariffing Requirements" as part of its Order of April 4, 1997, that we learned otherwise.

In most States, ensuring that previously tariffed payphone services meet the "new services" test, although an onerous process, should not be too problematic. We are gathering the relevant cost information and will be prepared to certify that those tariffs satisfy the costing standards of the "new services" test. In some States, however, there may be a discrepancy between the existing state tariff rate and the "new services" test; as a result, new tariff rates may have to be filed. For example, it appears that, in a few States, the existing state tariff rate for the COCOT line used by independent PSPs may be too low to meet the "new services" test and will therefore have to be raised.

In order to allow deregulation to move forward and ensure that LEC PSPs are able to compete on a level playing field starting, as planned, on April 15, 1997, we propose that the limited waiver issued by the Commission on April 4 for interstate tariffs apply to intrastate payphone tariffs as well. Specifically, we request that the Commission grant us 45 days from the April 4th Order to file new intrastate tariffs, in those States and for those services where new tariffs are required. Each LEC will undertake to file with the Commission a written ex parte document, by April 15, 1997, attempting to identify those tariff rates that may have to be revised.

Unlike with federal tariffs, there is of course no guarantee that the States will act within 15 days on these new tariff filings, particularly where rates are being increased pursuant to federal guidelines. Provided, however, that we undertake and follow-through on our commitment to ensure that existing tariff rates comply with the "new services" test and, in those States and for those services where the tariff rates do not comply, to file new tariff rates that will comply, we believe that we should be eligible for per call compensation starting on April 15th. Once the new state tariffs go into effect, to the extent that the new tariff rates are lower than the existing ones, we will undertake to reimburse or provide a credit to those purchasing the services back to April 15, 1997. (I should note that the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance. Moreover, we will not seek additional reimbursement to the extent that tariff rates are raised as a result of applying the "new services" test.)

The LECs thus ask the Commission to waive the requirement that effective intrastate payphone tariffs meet the "new services test," subject to three conditions: (1) LECs must file a written ex parte with the Commission by April 15, 1997, in which they attempt to identify any potentially non-compliant state tariff rates, (2) where a LEC's state tariff rate does not comply with the "new services" test, the LEC must file a new state tariff rate that does comply within 45 days of the April 4, 1997 Order, and (3) in the event a LEC files a new tariff rate to comply with the "new services" test pursuant to this waiver, and the new tariff rate is lower than the previous tariff rate as a result of applying the "new services" test, the LEC will undertake (consistent with state regulations) to provide a credit or other compensation to purchasers back to April 15, 1997.

The requested waiver is appropriate both because special circumstances warrant a deviation from the general rule and because the waiver will serve the public interest. Because the federal "new services" test has not previously been applied to existing state services -- and because the LECs did not understand the Commission to be requiring such an application of the test until the Commission issued its clarification order just a few days ago -- special circumstances exist to grant a limited waiver of brief duration to address this responsibility. In addition, granting the waiver in this limited circumstance will not undermine, and is consistent with, the Commission's overall policies in CC Docket No. 96-128 to reclassify LEC payphone assets and ensure fair PSP compensation for all calls originated from payphones. And competing PSPs will suffer no disadvantage. Indeed, the voluntary reimbursement mechanism discussed above -- which ensures that PSPs are compensated if rates go down, but does not require them to pay retroactive additional compensation if rates go up -- will ensure that no purchaser of payphone services is placed at a disadvantage due to the limited waiver.

Accordingly, we request a limited waiver, as outlined above, of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions.

We appreciate your urgent consideration of this matter. Copies of this letter have been served by hand on the APCC, AT&T, MCI and Sprint.

Yours sincerely,

Michael K. Kellogg

Michael K. Kellogg

cc: Dan Abeyta
Thomas Boasberg
Craig Brown
Michelle Carey
Michael Carowitz
James Casserly
James Coltharp
Rose M. Crellin
Dan Gonzalez
Christopher Heimann
Radhika Karmarkar
Regina Keeney
Linda Kinney
Carol Mattey
A. Richard Metzger
John B. Muleta
Judy Nitsche
Brent Olson
Michael Pryor
James Schlichting
Blaise Scinto
Anne Stevens
Richard Welch
Christopher Wright

EXHIBIT E

Item 561

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on August 16, 2000

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 99-C-1684 - Petition filed by the Independent Payphone Association of New York, Inc. that the Commission Modify New York Telephone Company's Wholesale Payphone Service Rates and Award Refunds.

CASE 96-C-1174 - Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996.

ORDER APPROVING PERMANENT RATES
AND DENYING PETITION FOR REHEARING

(Issued and Effective October 12, 2000)

BY THE COMMISSION:

BACKGROUND

On December 12, 1999, the Independent Payphone Association of New York, Inc. (IPANY) filed a petition seeking: establishment of a permanent reasonable rate for: public access line (PAL) service provided by Verizon New York, Inc. f/k/a New York Telephone Company (Verizon), refunds from April 1, 1997; and establishment of prospective rates for public access lines and rates for usage.

A Notice Requesting Comments was issued on January 5, 2000 seeking comments on the appropriate level of permanent rates for PALs, features and usage. In response to the notice, Verizon filed comments on February 28, 2000. IPANY filed reply comments on March 20, 2000. Verizon filed rebuttal comments on April 6, 2000 and IPANY filed a response to the rebuttal on April 21, 2000.

COMMENTS

IPANY's Petition and Reply

In its petition, IPANY contends that rates for certain PALs were permitted to go into effect on a temporary basis and that permanent rates were never approved. It argues that under the FCC payphone orders, tariffs for payphone services must be cost-based, consistent with Section 276 of the Telecommunications Act of 1996 (the Act), nondiscriminatory, and consistent with Computer III tariffing guidelines.[1]

IPANY argues that the rates must meet the "new services test" in 47 CFR § 61.49(g)(2). It says the new services test applies a direct cost standard, which it argues, is met by use of Total Element Long Run Incremental Cost (TELRIC) methodology.

IPANY concedes that:

> [i]ndependent payphone providers are not telecommunications carriers within the definition of the Telcom Act. Accordingly, the provisions of the Act which require that services, facilities and Network Elements be priced at TELRIC rates do not, by themselves, strictly govern the rates for underlying payphone service provided to IPANY members.... However, simply because TELRIC rates are not automatically

[1] IPANY's petition at 3, citing, Implementation of the Payphone Reclassification and Compensation Provision of the Telecommunications Act of 1996, CC Docket 96-128, Order released April 4, 1997, DA 96-678 (Payphone Clarification Order).

> mandated by §251 and §252 for payphone operators, does not mean that TELRIC and TELRIC-like rates, which encompass the same cost efficient and non-discriminatory purposes, should not be used under authority of §276. That, in fact, is exactly the result that follows from the FCC's requirement that the 'New Services Test' be applied to the facilities and services purchased by pay telephone providers.[2]

In further support of its arguments, IPANY points to the FCC Common Carrier Bureau Order, released March 2, 2000 in CCB/CPD No. 00-01 (FCC order).[3] In that order, the FCC's Common Carrier Bureau directed the four largest Wisconsin local exchange companies (LECs) to file tariffs with the FCC for intrastate payphone rates, with cost justification studies. The FCC order states that the rates for payphone services must satisfy the new services test. The order continues:

> To satisfy the new services test, an incumbent LEC filing payphone line rates must demonstrate that the proposed rates do not recover more than the direct costs of the service plus 'a just and reasonable portion of the carrier's overhead costs' [footnote omitted]…. Given that the new services test is a cost-based test, overhead allocations must be based on cost, and therefore may not be set artificially high in order to subsidize or contribute to other LEC services. For purposes of justifying overhead allocations, UNEs appear to be 'comparable services' to payphone line services…the LEC must demonstrate that in setting its payphone line rates it has taken into account other sources of revenue (e.g., SLC/EUCL, PICC, and CCL access charges) that are used to recover the costs of the facilities involved…. At this time, this Order only applies to the LECs in Wisconsin specifically identified herein.[4]

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[2] IPANY Petition, p. 9.

[3] In the Matter of Wisconsin Public Service Commission Order Directing Filings, CCB/CPD No. 00-1, adopted March 1, 2000, released March 2, 2000, DA 00-347.

[4] FCC Order, pages 4-5.

IPANY argues that the FCC order provides that Unbundled Network Elements (UNEs) are comparable to payphone line services and the same overhead allocation should be used for both. IPANY contends that the FCC has distinguished payphone rates from other business rates. As an example, IPANY argues that only payphone service rates are subject to the new services test. IPANY continues that Verizon's rates do not meet the new services test because they include "grossly excessive overhead margins and subsidies.[5]

IPANY requests that the rate for PALs as of April 1, 1997 be set on a permanent basis at $12.49, less the federal End User Common Line charge (EUCL), and subsequently less both EUCL and the Primary Interexchange Carrier Charge (PICC). It requests that refunds be issued to independent payphone providers (IPPs) from April 1, 1997.

On a prospective basis, IPANY requests that the rate for PALs be established at TELRIC for unbundled links, as deaveraged by the Commission, less any EUCL charge and any PICC imposed with respect to the PAL line. Finally, IPANY requests that on a prospective basis, usage service be provided at rates equivalent to TELRIC.

Verizon's Comments and Rebuttal

Verizon comments that its payphone-related rates are cost-based, including a reasonable contribution to overhead, in compliance with the FCC's new services test and the Commission's regulatory policies and decisions.

Verizon states that its PAL rates have been in effect on a permanent basis since 1992; it argues that only the Public Access Smart-Pay Line (PASPL) rates were approved on a temporary basis in 1997, and that IPANY has not contested PASPL rates in

[5] IPANY's Reply at 10.

its petition. Verizon argues that its rates are well within the range of pricing margins, which the FCC has ruled is reasonable.

Verizon states that in the original 1997 filing, the direct cost of $21.59 was inappropriately labeled "TELRIC". It argues that TELRIC is not the appropriate economic standard for developing long run incremental costs for retail service offerings.

Verizon also argues that EUCL and PICC charges should not be subtracted from the cost of the loop to calculate a cost-based PAL rate. Verizon notes that the EUCL and PICC are federally imposed charges that Verizon is required to assess on all business lines. Verizon continues that the FCC is clear that payphone service providers (PSPs) are to be treated as retail customers, not telecommunication carriers. It emphasizes that the new services test does not require use of TELRIC to price payphone services provided to PSPs. Verizon contends that providing PALs to PSPs is more costly than to CLECs. It must provide retail functions, such as marketing, billing and customer service to PSPs. Therefore, it argues, TELRIC is an inappropriate standard because it does not reflect these additional costs.

Verizon argues that the new services test does not apply to usage rates because they are not payphone specific. It also claims that refunds for PAL rates are inappropriate because the rates have been permanent since 1992.

In its Rebuttal, Verizon contends that the Commission should give no weight to the FCC Common Carrier Bureau Order because it directly contradicts long-standing FCC precedent. It notes that a coalition of LECs has sought a stay of the order pending full FCC review.

DISCUSSION

On March 31, 1997, an Order Approving Tariff on a Temporary Basis was issued in Case 96-C-1174.[6] In the order, Public Access Smart-Pay Line (PASPL) services were introduced and PASPL rates were approved on a temporary basis because the PASPL rates had not been tested in the coin telephone marketplace. It appears from the Order that no revised tariffs for PAL services[7] were filed in 1997 and the existing PAL service rates were left in place. Thus, as Verizon indicates, only the PASPL rates were set on a temporary basis in 1997.

IPANY is seeking review of all rates being charged by Verizon to independent payphone providers, including PALs, features and functions and usage. The current rates for Verizon's payphone services recover direct embedded cost plus a reasonable contribution toward common costs and overhead. Traditionally, under the new services test, the FCC allowed rates one to two times above direct embedded costs. Verizon's payphone rates include common costs and overhead at 30% above direct embedded costs. The Commission approved the rates as including a reasonable contribution toward common costs and overhead.

Although competitive local exchange companies (CLECs), as carriers, are entitled to TELRIC rates for PALs as UNEs under the Telecommunications Act of 1996, payphone service providers (PSPs), as end user subscribers, are not entitled to the same treatment under the Act. As Verizon points out, providing PALs

[6] Case 96-C-1174 - Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Service Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996.

[7] PAL services are used by IPPs to provide the vast majority of existing payphone services via "smart" coin and coinless pay telephone terminal equipment. The basic PAL rate is $15.47.

to CLECs is less costly than providing them to PSPs. Verizon explains that CLECs receive only raw billing data and bill their own customers. CLECs handle their own customer complaints and are responsible for end-user billing questions, service requests, testing end user lines, and isolating trouble prior to reporting it to Verizon. In contrast, Verizon notes that retail PSPs are responsible for none of these obligations. Rather they are served by the Verizon billing manager, provided with detailed bills and assisted with billing inquiries and service requests.

IPANY's reliance on the FCC Common Carrier Bureau order is misplaced. First, by its terms it only applies to the named Wisconsin LECs. Therefore, it is not binding on us in reviewing Verizon's payphone rates. Second, the approach used in that order does not establish that the rates set by the Commission do not satisfy the new services test. We find that Verizon's payphone rates do satisfy the FCC's new services test. Finally, given the retail functions involved in providing service to PSPs (as opposed to CLECs), it is not clear that UNEs are 'comparable services' to payphone line services.

IPANY also argues that lower rates are needed because the payphone business has been reduced by use of cellular phones. There is little or no indication that the payphone market is shrinking in New York, or that there is any shortage of payphones in the State.[8] We will continue to watch the market

[8] Verizon has reported a reduction in the total number of payphone access lines it is providing to both its own and independent payphones of about 3% over the last six months. However, it appears that during that same period, the number of payphone UNE-P loops that the company is selling to CLECs, who are in turn using these elements to serve payphone providers, is up by at least an equal amount. In addition, during that same period, it is anticipated that growth occurred in the provision of payphone access lines by facilities based CLECs.